Filed 7/18/19 P. v. Maldonado CA4/2

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION TWO

THE PEOPLE, Plaintiff and Respondent, v. LUIS RENE MALDONADO, Defendant and Appellant.	E070961 (Super.Ct.No. FWV17003336) OPINION

APPEAL from the Superior Court of San Bernardino County. David A. Williams, Judge. Affirmed.

Tyrone A. Sandoval, under appointment by the Court of Appeal, for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Julie L. Garland, Assistant Attorney General, Michael Pulos and Teresa Torreblanca, Deputy Attorneys General, for Plaintiff and Respondent.

I

INTRODUCTION

While under the influence of methamphetamine, defendant and appellant Luis Rene Maldonado stole a vehicle containing over $9,000 worth of tools. Defendant pleaded no contest to receiving a stolen vehicle (Pen. Code, § 496d).[1] He also admitted that he had suffered one prior strike conviction (§§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). In return, the remaining allegations were dismissed, and defendant was sentenced to a stipulated term of two years eight months in state prison with 280 days of credit for time served. Following a restitution hearing approximately seven months after he pleaded no contest, the trial court ordered defendant to pay $9,279 in victim restitution. On appeal, defendant contends because the trial court refused to allow him to testify at the restitution hearing, the procedure for the restitution hearing was fundamentally unfair in violation of his due process rights. We reject this contention and affirm the judgment.

II

FACTUAL AND PROCEDURAL BACKGROUND[2]

On August 24, 2017, at approximately 3:35 p.m., the victim's 2015 Chevrolet Silverado pickup truck was stolen from a parking lot in the city of Fontana. The victim

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[1] All future statutory references are to the Penal Code unless otherwise stated.

[2] The factual background is taken from the preliminary hearing transcript and the probation officer's report.

called the police to report the vehicle theft, and a Fontana police officer responded to investigate the crime. The officer met with the victim who stated his truck was equipped with a security device called OnStar. The officer called OnStar and spoke with an OnStar representative. The representative informed the officer that the vehicle was "at the 10 Freeway and Mount Vernon." The officer immediately went to that location. After the officer located the vehicle, he conducted a traffic stop and detained defendant. Defendant was the sole occupant of the vehicle.

The victim arrived at the location and confirmed the vehicle belonged to him. The victim also informed the officer that he did not know defendant and that he had not given defendant permission to drive his vehicle. The victim further informed the officer that he had left his vehicle unlocked with the keys in the ignition in a parking lot while he walked into a cellphone store. When the victim returned about 20 minutes later, he noticed his vehicle was missing. The officer confirmed that the vehicle's license plate number and VIN number matched the numbers initially provided by the victim.

Approximately 20 to 30 minutes had passed from the time the officer received the stolen vehicle report to when the officer made contact with defendant. Defendant stated that he was using methamphetamine at the time of the offense and was not thinking straight. When he saw the truck was left running, he took the vehicle. He also asserted that the victim should not have left his keys in the ignition.

On September 13, 2017, an information was filed charging defendant with receiving a stolen vehicle (§ 496d; count 1) and unlawfully driving or taking a vehicle

without the owner's consent (Veh. Code, § 10851, subd. (a); count 2). The information further alleged that defendant had suffered one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i); 1170.12, subds. (a)-(d)) and two prior prison terms (§ 667.5, subd. (b)).

On November 15, 2017, pursuant to a negotiated disposition, defendant pleaded no contest to count 1, and admitted he had suffered a prior strike conviction. Defendant further entered into a *Harvey*[3] waiver, agreeing that the trial court could consider his dismissed charge or any other charges the district attorney agreed not to file in determining the sentence, presentence credits, and restitution. The sentencing hearing was continued to January 10, 2018.

On November 21, 2017, the victim informed a probation officer that he was seeking restitution in the amount of $9,000 for tools taken from his truck and that he would submit the necessary documentation for the restitution claim.

On January 9, 2018, the probation officer filed a "Restitution Addendum," noting the victim had requested restitution in the amount of $11,584 for the missing tools and lost wages. A copy of the victim's itemized list was attached to the Restitution Addendum. The probation officer recommended defendant be ordered to pay victim restitution in the amount of $11,584.

The sentencing hearing was held on January 10, 2018. At that time, defense counsel requested to postpone the restitution hearing, but go forward with sentencing.

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[3] *People v. Harvey* (1979) 25 Cal.3d 754.

When the court asked if defendant was going to waive his right to be present at the future restitution hearing, defense counsel initially stated that defendant did not wish to waive his presence, but then stated that defendant would do so. The court thereafter sentenced defendant in accordance with his plea agreement to 32 months in prison with 280 days of credit for time served.

After sentencing defendant and scheduling the restitution hearing for January 26, 2018, the court stated, "[Defendant], you have a right to be present at that hearing. Do you understand that?" Defendant responded, "Um, yes. If I'm present, is there any way it would be a different outcome on it?" Defense counsel thereafter stated, "He's still preferring to go to state prison." The court asserted, "I'm sorry?" Defense counsel responded, "He's still preferring to be sentenced today and not [be] present for the hearing." The court thereafter asked defendant again, "Do you understand you have a right to be present at that restitution hearing, sir?" Defendant replied, "Yes." The court then asked, "Do you waive and give up your right to be present and agree that your attorney can appear for you, sir?" Defendant replied, "Yes." The court concluded the hearing by stating, "All right. That will be the order. 1/26 at 8:30 in this department for an informal restitution hearing. The probation officer will not be ordered to be present at that time. Thank you."

On January 26, 2018, the restitution hearing was continued to January 29, 2018. At that time, defense counsel did not inform the court that defendant had changed his

mind and wished to testify. Instead, the court's January 26, 2018 minute order notes, "Defendant's presence previously waived."

On January 29, 2018, the restitution hearing was continued to March 2, 2018. Again, at that time, defense counsel did not inform the court that defendant had changed his mind and wished to testify. The court's January 29, 2018 minute order indicates that defendant had previously waived his presence and "Matter is set for Formal Restitution Hearing."

The March 2, 2018 hearing was continued at the request of defense counsel to April 13, 2018, because counsel was unavailable. Again, no mention was made of defendant's desire to testify at the restitution hearing, and the court's March 2, 2018 minute order notes that defendant had previously waived his presence.

On April 13, 2018, the restitution hearing was continued by stipulation of the parties to June 21, 2018, because defense counsel and the probation officer were not available at the same time during the day. Again, defense counsel made no request to have defendant present at the restitution hearing, and the court's minute order indicates defendant had previously waived his presence.

Approximately five months after the sentencing hearing, the restitution hearing was held on June 21, 2018. On that date, the court asked defense counsel if he had any evidence he wanted to introduce, and defense counsel said he did not. The prosecutor thereafter informed the court that there was a miscalculation in the amount of restitution the victim was requesting and noted the correct calculation should be $9,279. After the

court recalculated the victim's itemized losses and confirmed the actual loss at $9,279, the court asked defense counsel if he was satisfied with the $9,279. Defense counsel responded, "No." Defense counsel argued that defendant was not charged with and did not plead guilty to stealing the tools at issue and that he had only pleaded no contest to receiving the stolen vehicle. Defense counsel also noted that the car was recovered approximately 30 minutes after it was stolen and in that 30 minutes, defendant had apparently managed to get rid of those tools. The prosecutor stated that the tools were missing from the victim's vehicle once he received the vehicle back and that defendant had entered into a *Harvey* waiver when he pleaded no contest to receiving the stolen vehicle.

After the court noted that the tools could have been "dumped within a half hour," defense counsel asserted that may be true "but it doesn't show that [defendant] was responsible for the loss of that property, which is what restitution is about." The court responded, "Okay. So [defendant] pled guilty to taking the vehicle. But he doesn't know what was in the back or doesn't know what happened to all the stuff in the back." Defense counsel then argued, "Or didn't have [the tools] when he took [the vehicle]." When the court stated the burden was on defendant and it "need[ed] more than just argument" to establish the tools were not there and that defense counsel could cross-examine the victim, defense counsel responded, "I'm not disputing that they were lost. That's not the dispute. That's not my contention. If the Court does want that, I don't have any problem getting [defendant] here. He's the one who can clear things up." The

court told defense counsel that it did not need defendant to testify, it needed testimony from "the other fellows" to establish that fact. Defense counsel responded that he presumed the victim would come in and say that the tools were in the back of the car when it was taken. However, he argued, it was "possible" that someone else took the car and gave it to defendant after the tools were removed.

Defense counsel then told the court, "Now, if you want [defendant's] testimony for that, we will have to continue it again and have to get a transport order." He then added, "Certainly the People can seek restitution for all crimes related to those resulting from what [defendant] is charged with, if there is some nexus. I thought it would be enough to show the Court that the loss of property. . . it wasn't even charged." The prosecutor responded that there was a nexus between the charged offenses "because the tools were there before the car was stolen and not there after the car was stolen. And the victim is requesting valid restitution for the loss of those items."

The court denied defense counsel's request to consider defendant's testimony, finding it was not reliable. Defense counsel reiterated that it was "just as likely [defendant] took the car from somebody who already got rid of the property." He then asked the court, "So wouldn't his testimony be helpful towards that end?" Defense counsel also noted, "The cross-examination is not going to elicit anything other than perhaps some issues with the calculations of these numbers. I have no doubt the victim will come in and say all this stuff was taken. Who took it." The court stated, "Somehow [defendant] is going to now testify who took the vehicle first, and he just got it later."

When defense counsel stated that was consistent with the way the case was charged, the trial court reminded him that defendant was initially charged with both stealing the car and receiving it. The prosecutor noted that defense counsel was "asking the Court to think it's improbable that [defendant] ditched this equipment within 30 minutes. Yet in the same breath, asking the Court to believe someone else took the vehicle, ditched it, then handed it over to [defendant] for [defendant] to be stopped by law enforcement and caught with the vehicle. [¶] So in any sense, I think, if there was someone else mysteriously involved in the actual taking of the vehicle and the property within the vehicle, that [defendant] would also certainly be an aider and abetter [*sic*] in taking and concealing and withholding the vehicle."

The court denied defense counsel's request for a continuance "to get [defendant] here" and ordered defendant to pay $9,279 in victim restitution. The court explained that if defendant were to come in and say he did not know what happened to the tools, the court would not find that testimony reliable. However, if defense counsel wanted a continuance to have the victim come in to be cross-examined, the court might consider granting the continuance. Defense counsel did not call the victim to testify.

On July 23, 2018, defendant filed a timely notice of appeal.

III

DISCUSSION

Defendant argues that because the trial court refused to allow him to testify at the restitution hearing, the procedure for the restitution hearing was fundamentally unfair, in violation of his due process rights. We disagree.

Criminals must make restitution to their victims in every case. (Cal. Const., art. I, § 28, subd. (b)(13); Pen. Code, § 1202.4; see *People v. Weatherton* (2015) 238 Cal.App.4th 676, 684 (*Weatherton*).) Section 1202.4, subdivision (f), provides that with certain exceptions, "in every case in which a victim has suffered economic loss as a result of the defendant's conduct, the court shall require that the defendant make restitution to the victim or victims in an amount established by court order." Section 1202.4, subdivision (f)(1), provides that a defendant "has the right to a hearing before a judge to dispute the determination of the amount of restitution."

A defendant has a due process right to be present at his restitution hearing, which is part and parcel of the sentencing process. (*People v. Wilen* (2008) 165 Cal.App.4th 270, 287 [defendant has a right to be present at all critical stages of a criminal prosecution, including sentencing and pronouncement of judgment]; *People v. Cain* (2000) 82 Cal.App.4th 81, 87 (*Cain*) [a victim restitution hearing is "part and parcel of the sentencing process"].) However, a restitution hearing, as a part of sentencing proceedings, does not require the formalities of other phases of a criminal prosecution. (*Weatherton*, *supra*, 238 Cal.App.4th at p. 684; *People v. Prosser* (2007) 157

Cal.App.4th 682, 692.) "The scope of a criminal defendant's due process rights at a hearing to determine the amount of restitution is very limited: '"A defendant's due process rights are protected when [he or she has] notice of the amount of restitution claimed . . . , and . . . has an opportunity to challenge the figures . . . at the sentencing hearing."'" (*Cain*, at p. 86; *Prosser*, at p. 692.) To satisfy due process, a judge need not employ the "'narrow net'" of traditional evidence rules, and enjoys "'"'virtually unlimited discretion'"'" in choosing the type and source of information to rely upon. (*Prosser*, at p. 692.) Moreover, a defendant may waive his or her right to be present, provided the waiver is knowing, intelligent, and voluntary. (*People v. Cunningham* (2015) 61 Cal.4th 609, 633; *People v. Weaver* (2001) 26 Cal.4th 876, 967 (*Weaver*).)

Accordingly, defendant had a due process right to be present at the restitution hearing, as that hearing was a critical stage of the criminal proceedings. However, defendant could waive that right through a knowing, intelligent, and voluntary waiver.

We apply "'the independent or de novo standard of review to a trial court's exclusion of a criminal defendant from trial, either in whole or in part, insofar as the trial court's decision entails a measurement of the facts against the law.'" (*People v. Gutierrez* (2003) 29 Cal.4th 1196, 1202; see *People v. Waidla* (2000) 22 Cal.4th 690, 741.) Further, "[t]he voluntariness of a waiver is a question of law which appellate courts review de novo." (*People v. Panizzon* (1996) 13 Cal.4th 68, 80.)

A. *Waiver of Right to Be Present at Restitution Hearing*

Applying the de novo standard of review, we conclude defendant entered a knowing, intelligent, and voluntary waiver of his due process right to be present at the restitution hearing when he stated in open court that he wished to waive that right. Regarding whether defendant's waiver was voluntary, defendant plainly agreed on the record with his attorney present to forego his right to be present in open court. We find no indication in the record that defendant experienced any type of coercion or pressure to waive his right to be present at the restitution hearing. The trial court informed defendant that he had a right to be present at the hearing. Defendant stated that he understood, but still wanted to waive his presence. The court asked defendant whether he waived and gave up his "right to be present" and agreed that his attorney could appear on his behalf. Defendant responded, "Yes." Accordingly, the evidence in the record indicates that the waiver was voluntary.

In addition, although the trial court did not specifically explain the importance of the restitution hearing, we conclude that the nature of the right that defendant was waiving was sufficiently defined for defendant so that his waiver was knowing and intelligent. Specifically, in the trial court's colloquy with defendant, the court specifically set a restitution hearing and informed defendant that he had a right to be present at the restitution hearing. Defendant decided that he did not want to attend the restitution hearing, apparently because he did not believe his presence would make a difference with respect to the outcome of the hearing. From the court's comments, it should have been evident to defendant that disputed issues regarding restitution would be

decided at the restitution hearing. Further, because the probation department had filed a restitution memorandum, noting the victim was requesting $11,584 in restitution, prior to the January 10, 2018 sentencing hearing where defendant had waived his right to be present at the restitution hearing, he was on notice that the restitution amount could be in a significant amount. If defendant had any uncertainty about what the restitution hearing would involve, defense counsel was in the courtroom, and defendant could have consulted him prior to agreeing to waive his right to be present at the restitution hearing.

Our Supreme Court's decision in *Weaver*, *supra*, 26 Cal.4th at p. 967, is pertinent to our analysis of whether defendant's waiver was knowing and intelligent. In *Weaver*, the defendant, who was represented by counsel, specifically told the trial court that he wanted to waive his right to be present for part of the trial. On appeal, the defendant argued that his waiver of his right to be present was not knowing or intelligent because "he was not advised of the importance of his personal presence before he waived it," in that specifically, "'he was not admonished by the court or counsel as to the significant impact his presence and demeanor would have on the jury.'" (*Id*. at pp. 966-967.) The *Weaver* court rejected the argument, explaining that despite the absence of any specific admonishment by the trial court about the importance of the defendant's presence at trial, the defendant's waiver of his right to be present was knowing and intelligent, as he stated his waiver in open court for his own reasons and was represented by counsel. (*Id*. at p. 967; see *People v. Mendoza* (2016) 62 Cal.4th 856, 900 [the record established that the

defendant's waiver was knowing and intelligent when he personally waived his presence in the courtroom during the playing of 911 call recording].)

As in *Weaver*, *supra*, 26 Cal.4th 876, we conclude that because defendant personally stated in open court that he wanted to waive his right to be present at the restitution hearing, and his attorney was with him at the hearing, which afforded defendant the opportunity to receive clarification if requested, defendant entered a knowing and intelligent waiver. Therefore, defendant was not denied his due process right to be present or to testify at the restitution hearing.

B. *Denial of Continuance*

To the extent defendant is arguing the trial court abused its discretion and violated his right to due process by refusing to grant him a continuance of the restitution hearing so he could testify, we reject this claim.

A party seeking a continuance is required to give written notice to the opposing party "at least two court days before the hearing sought to be continued." (§ 1050, subd. (b).) A party may seek a continuance without complying with that notice requirement, and the court may grant the request if the party first shows good cause for failure to so comply. (§ 1050, subds. (c)-(d).) In no event can a continuance be granted without a showing of good cause. (§ 1050, subd. (e).) "Thus, where a party seeking a continuance fails to comply with the notice requirements, the trial court must make a two-step decision. It must first determine whether there was good cause for failure to comply with those requirements. If there was not good cause, the court must deny the

motion. [Citation.] If the court finds there was good cause for failure to comply, it must then decide whether there is good cause for granting a continuance." (*People v. Harvey* (1987) 193 Cal.App.3d 767, 771.) We review the trial court's ruling for an abuse of discretion. (*People v. Fudge* (1994) 7 Cal.4th 1075, 1105 (*Fudge*).)

In this case, it is undisputed that defendant did not comply with the statutory notice requirements. Nor did counsel offer justification for the failure to do so. The trial court would have been within its discretion to summarily deny the motion on that basis. Even assuming the failure to provide notice was excused, the trial court did not abuse its discretion in denying the continuance.

In ruling on a motion to continue, the court may consider, among other things, "the defendant's diligence in light of previous opportunities to obtain the necessary evidence" (*People v. Jenkins* (2000) 22 Cal.4th 900, 1037) and "'"the burden on other witnesses, jurors and the court and, above all, whether substantial justice will be accomplished or defeated by a granting of the motion."'" (*Fudge, supra*, 7 Cal.4th at p. 1105.) The court is entitled to ensure that the matter proceeds in a timely fashion. (*Id*. at p. 1107.)

Here, defendant and his counsel were aware of the amount of and basis for the requested restitution for approximately five months prior to the restitution hearing, which had been continued four times. Defendant and his counsel thus had adequate time to review the documents and request defendant's presence prior to the restitution hearing if, in fact, defendant's presence was necessary. At the restitution hearing, defense counsel

suggested that it might be helpful to have defendant testify, despite defendant's waiver of his right to be present. However, defense counsel did not explain why he had not secured defendant's attendance at the hearing earlier. Defense counsel also did not tell the court that defendant had expressed a desire to withdraw the prior waiver of his right to be present at the restitution hearing, or what defendant would testify to if called to the stand. Moreover, defense counsel failed to establish that defendant's proffered testimony would have likely affected the outcome of the proceedings. Defense counsel argued that, if given the opportunity, defendant might testify that the victim's tools were not in the vehicle when he took possession of it. Defense counsel further suggested that there may have been another person who stole the truck and took the tools before giving the truck to defendant. However, defendant admitted to the probation officer that he was the person who stole the vehicle while under the influence of methamphetamine. Defense counsel's arguments were speculative. Even if defense counsel's arguments regarding the restitution have merit, defendant can petition to have the award modified under sections 1202.4, subdivision (f)(1), and 1203.3, subdivisions (b)(4) and (5). On this record, the trial court therefore did not abuse its discretion in denying the continuance.

The denial of a continuance did not deprive defendant of his constitutional right to due process. While the trial court's broad discretion to grant or deny continuances may not be exercised in such a manner as to "deprive the defendant . . . of a reasonable opportunity to prepare" the defense or to impair a criminal defendant's constitutional right to due process, the court's ruling in this case had no such effect. (*People v. Snow*

(2003) 30 Cal.4th 43, 70, 73 [denial of a continuance did not "deprive counsel of a reasonable opportunity to prepare the defense" where the "case had been pending in the superior court for 26 months" and the "court had already granted numerous and lengthy continuances at defense request"].) Defendant and his counsel had ample time to prepare for the restitution hearing and to review the documentation in support of the restitution request. Moreover, as noted above, unlike at trial, the "scope of a criminal defendant's due process rights at a hearing to determine the amount of restitution is very limited: '"A defendant's due process rights are protected when the probation report gives notice of the amount of restitution claimed . . . , and the defendant has an opportunity to challenge the figures in the probation report at the sentencing hearing."'" (*Cain*, *supra*, 82 Cal.App.4th at p. 86.) Accordingly, we find no error and no violation of defendant's due process rights.

C. *Whether the Restitution Hearing Was Fundamentally Unfair*

Defendant argues that the trial court's refusal to allow him to testify at the restitution hearing, because the court believed defendant's testimony would be unreliable, was "improper prejudgment of his testimony, resulting in a fundamentally unfair procedure in violation of due process." He therefore believes remand is required "so that the court can hold a restitution hearing at which [he] has the opportunity to testify on his own behalf." We disagree.

As explained previously, restitution hearings require fewer due process protections than criminal or civil trials. (*People v. Chappelone* (2010) 183 Cal.App.4th 1159, 1184;

People v. Giordano (2007) 42 Cal.4th 644, 662, fn. 6.) "The trial court violates the defendant's due process right at a hearing to determine the amount of restitution if the hearing procedures are fundamentally unfair." (*Cain, supra*, 82 Cal.App.4th at p. 87, citing *People v. Arbuckle* (1978) 22 Cal.3d 749, 754.) Due process rights regarding restitution are protected when there is notice of the amount of restitution claimed and an opportunity is provided to challenge that amount. (*Cain*, at p. 86.) At the sentencing stage of a criminal prosecution, a defendant does not have a Sixth Amendment right of confrontation. (*Arbuckle*, at p. 754.) This limitation has been extended specifically to include restitution hearings. (*Cain*, at pp. 86-87.)

In *Cain, supra*, 82 Cal.App.4th 81, this court considered a defendant's right to call the victim's psychotherapist at a restitution hearing. (*Id*. at pp. 86-87.) The defendant sought to examine the psychotherapist regarding whether the victim's counseling was related to the defendant's crime and contended on appeal that the trial court's denial of his request to call the psychotherapist as a witness violated his right to confront adverse witnesses and his right to due process. (*Id*. at pp. 84-85.) We found no error and explained that because a restitution hearing "is part and parcel of the sentencing process," and there is no Sixth Amendment right of confrontation at a sentencing hearing, the defendant did "not have a state or a federal constitutional right to cross-examine the psychotherapist who provides counseling to the victim of the defendant's crime." (*Id*. at p. 87, fn. omitted.)

We went on to hold that the defendant's right to due process was not violated and stated: "[D]efendant had full and fair opportunity to present affirmative evidence that counseling received by the victim was not directly related to the crime. For example, defendant could have called an expert to show that in light of the length of the counseling sessions and/or the time gap between the crime and the counseling, the counseling could not have been related only to the crime. Defendant could have also introduced evidence of the victim's preexisting mental or psychological ailment or evidence that the victim was previously treated by a mental health professional." (*Cain*, *supra*, 82 Cal.App.4th at p. 87, fn. omitted.)

In this case, defendant had notice of the restitution sought by the victim. He was also provided with the opportunity to contest that amount at the restitution hearing, as well as, the opportunity to cross-examine the victim. Defendant could have been present at that hearing but chose to waive his presence. Just as in *Cain*, defendant "had full and fair opportunity to present affirmative evidence" but failed to do so. (*Cain*, *supra*, 82 Cal.App.4th at p. 87.) Therefore, because defendant had a fair opportunity to present affirmative evidence and an opportunity to be present at the restitution hearing, we find that defendant's right to due process was not violated.

IV

DISPOSITION

The judgment and the restitution order are affirmed.

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

CODRINGTON
J.

We concur:

McKINSTER
Acting P. J.

MENETREZ
J.